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August 9, 2019

Via Electronic Filing

Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, SC 29211

Re: Ecoplexus, Inc. vs. South Carolina Electric and Gas Company
DOCKET NOS. 2018-401-E, 2019-51-E, and 2019-130-E

Dear Ms. Boyd:

Enclosed for filing in connection with the above-referenced matters, please *find Dominion Energy South Carolina Inc.'s (formerly South Carolina Electric & Gas Company) Proposed Order to Motion to Maintain Status Quo.*

By copy of this letter, we are serving all parties.

If you have any questions, please do not hesitate to contact me.

Sincerely,

J. Ashley Cooper

JAC:hmp
Enclosure
cc: (Via Electronic Mail and First Class Mail)
Richard L. Whitt
Jeremy C. Hodges
Weston Adams III
Jenny R. Pittman
Becky Dover
Jeffrey M Nelson
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BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NOS. 2018-401-E, 2019-51-E, and 2019-130-E

IN RE: Ecoplexus Inc., Complainant, v. South Carolina Electric & Gas Company, Defendant.	**DOMINION ENERGY SOUTH CAROLINA, INC.'S OPPOSITION TO ECOPLEXUS INC.'S MOTION TO MAINTAIN STATUS QUO IN THE FORM OF A PROPOSED ORDER**

OVERVIEW OF THE MATTER[1]

This matter comes before the Public Service Commission of South Carolina (the "Commission") pursuant to Ecoplexus Inc.'s ("Solar Developer") pending Motion to Maintain Status Quo (the "Pending Motion"). Similar Motions to Maintain Status Quo were filed by Beulah Solar, LLC ("Beulah") and Eastover Solar LLC ("Eastover") in Docket Nos. 2018-401-E (the "Beulah Docket") and 2019-51-E (the "Eastover Docket"), respectively. The Motions to Maintain Status Quo sought to enjoin the deadlines for certain payments owed pursuant to interconnection agreements that Solar Developer, Beulah, and Eastover entered into with Dominion Energy South Carolina, Inc. (formerly South Carolina Electric & Gas Company) ("DESC"). However, as described below, DESC recently reached an agreed resolution with each of Beulah and Eastover; as a result of those resolutions, it is not necessary for the Commission to consider the Motions to Maintain Status Quo filed by Beulah and Eastover.

I. Beulah and Eastover

[1] In this Proposed Order, DESC incorporates and does not waive all arguments made previously in these dockets.

Beulah entered into an Interconnection Agreement (the "Beulah IA") with DESC on September 24, 2018. Eastover entered into an Interconnection Agreement (the "Eastover IA") with DESC on November 13, 2018.

Beulah filed its Motion to Maintain Status Quo and Request for Modification of the Beulah IA in the Beulah Docket on December 28, 2018. Beulah's Motion to Maintain Status Quo requested that the Commission toll Beulah's obligations under the Beulah IA and grant an indefinite extension of the deadline for the first milestone payment thereunder.

After petitioning to intervene in the Beulah Docket,[2] Eastover filed its own Motion to Maintain Status Quo and its Request for Modification on January 24, 2019, in the Beulah Docket and the Eastover Docket. Like Beulah, Eastover's Motion to Maintain Status Quo requested the Commission toll Eastover's obligations under the Eastover IA and grant an indefinite extension of the deadline for the first milestone payment thereunder.

On February 4, 2019, DESC, Beulah, and Eastover filed a Joint Motion to Consolidate the Eastover Docket and the Beulah Docket. In the Joint Motion to Consolidate, the parties noted the "common and aligned interests" of Beulah and Eastover and the similarity of the relief sought by each. As a result, the Commission consolidated these dockets on February 11, 2019, by Order No. 2019-13-H.

II. Solar Developer

Solar Developer proposes to construct a 74.9 MW solar-fueled QF in Barnwell, South Carolina ("Barnwell PV1"). Solar Developer also proposes to construct a 71 MW solar-fueled QF in Jackson, South Carolina ("Jackson PV1"). Solar Developer executed two Interconnection Agreements (the "IAs")—one for Barnwell PV1 and another for Jackson PV1—with DESC on

[2] Eastover's Petition to Intervene in the Beulah Docket was granted by Order No. 2019-92, dated January 30, 2019.

February 11, 2019. Both interconnections are state-jurisdictional, and the IAs are the Commission-approved form and are governed by the Commission-approved South Carolina Generator Interconnection Procedures, Forms, and Agreements (the "South Carolina Standard"). In the IAs, Solar Developer agreed to a series of project Milestones (as defined therein), which detail "critical" construction milestones and responsibilities "as agreed to by the Parties," including the first Milestone payments (collectively, the "First Milestone Payments"). The First Milestone Payments were due on or before April 16, 2019.

On April 15, 2019, Solar Developer filed a Complaint in Docket No. 2019-130-E (the "Ecoplexus Docket") alleging, among other things, that it has not been presented with its desired power purchase agreements and disputing the calculation of the First Milestone Payments. With the Complaint, Solar Developer filed the Pending Motion requesting the Commission toll its obligations and grant an indefinite extension for the First Milestone Payments. DESC filed its Response in Opposition to Maintain Status Quo and Answer in the Ecoplexus Docket on April 25, 2019, and May 15, 2019, respectively.

As described below, DESC has not received either of the First Milestone Payments, and the due dates for the First Milestone Payments have passed. As a result, DESC removed Solar Developer from the queue and proceeded with projects previously behind Solar Developer in the queue. Now, Solar Developer and DESC dispute the implications flowing from such missed payments.

III. Consolidation and Oral Arguments on the Pending Motion

By Order No. 2019-293 (the "Consolidation Order"), on April 24, 2019, the Commission consolidated the Ecoplexus Docket with the already consolidated Beulah Docket and Eastover Docket. The Commission cited the "great similarity of the issues, facts, and arguments

presented" in each matter because each developer "raised objections to reasons why it should not have to complete a milestone payment to [DESC]." The Consolidation Order at ¶ 1 and ¶ 3. Although Beulah and Eastover initially did not object to consolidation, Beulah and Eastover then filed a Petition for Reconsideration of the Consolidation. In response, Order No. 2019-369, filed in the Ecoplexus Docket on May 6, 2019, clarified the Consolidation Order by noting that in consolidating these dockets, the Commission intended to resolve the common issue running through each of these dockets—"missed milestone payments and any implications flowing from those payments." Order No. 2019-369 at ¶ 3. Indeed, in each of these dockets, DESC argues that each interconnection agreement terminated pursuant to its terms and the provisions of the South Carolina Standard, specifically Section 5.2.4, because each developer failed to make the milestone payments as required under their interconnection agreement without first obtaining appropriate relief from the Commission.

The parties argued the common issues arising from the Motions to Maintain Status Quo in front of the Commission on June 27, 2019. As a result, the Commission ordered each of these dockets to be held in abeyance until July 31, 2019, "[t]o help facilitate discussions for settlement" and "provide time for the parties to resolve their differences." Order No. 2019-541 at ¶ 1 and ¶ 2. Indeed, DESC, Beulah, and Eastover have come to an agreed resolution of the matters contained in Beulah's and Eastover's Motion to Maintain Status Quo. However, the Commission understands that, although Solar Developer and DESC have discussed a potential settlement, no settlement has been reached to date.

SUMMARY OF THE BASIS FOR THE COMMISSION'S CONCLUSIONS

I. Solar Developer argues that since the Pending Motion was filed *prior to the date* upon which the First Milestone Payments were due, a Commission ruling was not required to toll the obligations owed.

As an initial matter, Solar Developer's Pending Motion, styled as a Motion to Maintain Status Quo,[3] is in fact a request for injunctive relief, i.e., a request for the Commission to enjoin the termination of the IAs as a result of Solar Developer's failure to make its First Milestone Payments by the deadlines set forth in the IAs. *See Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973) (stating that "[t]he sole purpose of an injunction is to preserve the status quo"). However, as this Commission has recently confirmed, nowhere in its statutory authority is the Commission given the ability to grant such injunctive relief. *See* Order No. 2019-521. As such, the Pending Motion must be denied on this ground alone.

Even if this Commission had the statutory authority to grant the injunctive relief requests by Solar Developer, this Commission disagrees with Solar Developer that simply filing the Pending Motion prior to the deadlines for payment of the First Milestone Payments tolls Solar Developer's obligation to pay the First Milestone Payments and preserves its queue positions until the Commission resolves the underlying allegations levied against DESC by Solar Developer. A party similarly seeking a preliminary injunction does not automatically secure the injunction by filing, but a party is only able to secure the requested relief through later order of the court.

Solar Developer correctly states that the Commission may modify IAs pursuant to S.C. Code Ann. Section 58-27-980 (2015, as amended) (the "Statute") and that Solar Developer is within its rights to request modification of the IAs by the Commission pursuant to Section 12.12 of the IAs. The applicable language from each is below:

[3] On this point, DESC makes a distinction alleging that Solar Developer does not truly seek to maintain status quo; because if the status quo were maintained, the IAs would remain terminated. Rather, DESC argues that Solar Developer is actually requesting that the Commission intervene to revive the terminated IAs, and then modify the deadlines for the First Milestone Payments.

> *S.C. Code Annotated Section 58-27-980*: No contract charge to be made to any person, corporation or municipality by any electrical utility for electricity . . . **shall be exempt from alteration, control, regulation and establishment by the Commission** . . . [n]or shall any contract establishing a rate or rates or any other contract affecting the use or disposition of its product or the charges to be paid therefor be entered into by any electrical utility without prior approval by the Commission, nor unless it be subject to amendment, modification, change or annulment by the Commission, **if the public interest so requires**. (emphasis added)
>
> *Section 12.12 of the IAs*: The Utility shall have the right to make a unilateral filing with the Commission to modify this Agreement with respect to any rates, terms and conditions, charges, or classifications of service, and **the Interconnection Customer shall have the right to make a unilateral filing with the Commission to modify this Agreement**; provided that each Party shall have the right to protest any such filing by the other Party and to participate fully in any proceeding before the Commission in which such modifications may be considered. Nothing in this Agreement shall limit the rights of the Parties except to the extent that the Parties otherwise agree as provided herein. (emphasis added)

Even so, Solar Developer's apparent claim that simply the act of filing tolls obligations under the IAs is untenable. To hold otherwise would retroactively grant the stay from the date of a unilateral filing, even though the Commission made no decision with respect to the disposition of such filing during that time. Section 12.12 of the IAs expressly contemplates that a party may request that the Commission modify an IA in the public interest, but a request for modification is not a request for injunctive relief and, in such event, "each party shall have the right to protest any such filing . . . and to participate fully in any proceeding before the Commission in which such modifications may be considered." (emphasis added).

In short, there is no provision approved by the Commission, whether in the South Carolina Standard, the Statute, Section 12.12, or otherwise, that would sanction the idea that simply filing a Motion to Maintain Status Quo with the Commission—even if contemplated by the IAs—freezes interconnection agreements and the underlying obligations of the parties at the point in time that filing is submitted to the Commission. Such a ruling would throw the arena

over which the Commission governs into chaos, constitute a novel reading of the IAs and the Commission's statutory authority, and would effectively place the Commission in the untenable position of administering the utilities' interconnection queues because the utilities will not know which provisions of the South Carolina Standard are mandatory and which are merely persuasive. The prospect of obtaining such extraordinary relief simply by making a filing with the Commission would surely be alluring to any number of solar developers, including many with projects that may not be viable, and the Commission would likely be flooded with their filings, DESC's queue would be back-logged, its expenses would balloon, and solar development in South Carolina would come to a grinding halt.

Because Solar Developer's obligations were not tolled by simply filing the Motion to Maintain Status Quo, the Commission must evaluate the consequences of the missed milestone payments. Section 6.2 of the IAs and Section 5.2.4 of the South Carolina Standard are controlling. Section 6.2 of the IAs states that a party's milestone obligations under the IAs "may be extended by agreement, except for timing for Payment or Financial Security-related requirements set forth in the milestones, which shall adhere to Section 5.2.4 of the [South Carolina Standard]." Section 5.2.4 of the South Carolina Standard requires that the First Milestone Payments "must be received by close of business forty-five (45) Business Days after the date the Interconnection Agreement is signed by the Interconnection Customer, where failure to comply results in the Interconnection Request being deemed withdrawn." (emphasis added). Further, Appendix 2 of the IAs expressly contemplates that "[f]ailure to make the [First Milestone Payments] may result in the termination of the Generator Interconnection Agreement and the withdrawal of the Generator Interconnection Application."

Based on the foregoing, the obligations under the original IAs remained in effect even after the filing of the Pending Motion absent Commission order. To date, DESC has not received the First Milestone Payments, the 45-day period contemplated by the South Carolina Standard has expired for each of the IAs, and the IAs are terminated.

In order to grant the relief requested in the Pending Motion, the Commission would have to (a) ignore the plain language of the Commission-approved IAs and the South Carolina Standard, and (b) revive and then modify two terminated IAs. The Commission will not do so here.

II. Solar Developer alleges that DESC mismanaged its interconnection requests.

Solar Developer alleges that DESC assigned interconnection costs to Jackson PV1 and Barnwell PV1 "in a discriminatory manner, [and violated PURPA], several provisions of 18 C.F.R. Section 292, and [certain] Commission orders" in handling the interconnection requests of Solar Developer. Pending Motion at ¶ 4. As a result, Solar Developer opines that it should not be required to make the First Milestone Payments, as required by the IAs and the South Carolina Standard, "[u]nless and until it is determined by the Commission that the interconnection costs made by [DESC] were made in a non-discriminatory basis." Solar Developer's Reply to DESC's Response in Opposition to Motion to Maintain Status Quo at 7.

DESC denies the alleged discrimination and avers that even assuming arguendo Solar Developer's unsubstantiated claims, these claims do not nullify Section 5.2.4 of the South Carolina Standard or otherwise excuse Solar Developer's failure to perform under the IAs. DESC notes that Solar Developer is a sophisticated party that has developed more than 80 solar facilities worldwide and that Solar Developer is well-versed in the regulatory avenues available to it to resolve precisely these kinds of disputes. If Solar Developer had legitimate concerns

about discriminatory practices or methodology, it could have raised its concerns with this Commission when the facilities studies were performed, or at the very least prior to entering into the IAs. It chose not to do so. Alternatively, Solar Developer could have entered into the IAs, filed the Complaint, made the First Milestone Payments on time as required by the Commission-approved IA and the South Carolina Standard, and then received a refund of those payments or any portion thereof if the Commission ultimately ruled in its favor. Again, Solar Developer chose not to do so. Rather, aware of its purported grievances, Solar Developer chose instead to move forward and executed an interconnection agreement on not one, but two projects.[4]

Having made its decision to move forward and secure its queue position, Solar Developer may not now have its cake (refusing to uphold the terms of the IAs that it voluntarily executed) and eat it too (failing to make the First Milestone Payments and still preserve its queue position).

III. Solar Developer alleges that no harm will result to lower-queued customers from its request to pause the queue and maintain the status quo.

Even if the Commission were to decide that it could ignore language and the resulting framework approved by this Commission to revive and modify the terminated IAs, the Commission would not do so because to do so would harm lower-queued customers, which may have viable projects.

[4] The record also demonstrates that Solar Developer requested that DESC extend the deadlines for the First Milestone Payments. See E-mail from Michael Wallace of Solar Developer to a working group that included Matthew Hammond of DESC (April 1, 2019, 5:23PM EST). At that time, DESC relayed to Solar Developer that Section 5.2.4 of the South Carolina Standard forbids DESC from unilaterally extending the date of these payments any further. See E-mail from Matthew Hammond of DESC to a working group that included Michael Wallace of Solar Developer (April 3, 2019, 9:54AM EST). Solar Developer acknowledged DESC's response and the requirements of the South Carolina Standard, the very requirements Solar Developer now attempts to circumvent. See E-mail from Michael Wallace of Solar Developer to a working group that included Matthew Hammond of DESC (April 3, 2019, 10:20AM EST).

Solar Developer claims that tolling obligations under the IAs and preserving queue positions would not cause harm to lower-queued customers. Indeed, Solar Developer characterizes DESC's assertion that harm to other interconnection customers would occur as a "red herring." Solar Developer's Reply to DESC's Response in Opposition to Motion to Maintain Status Quo at 8.

On the other hand, the record reveals that DESC currently has over 50 other active projects in its queue—each of which are progressing toward commercial operation. Pursuant to rules set forth by the Commission in the South Carolina Standard, DESC must administer each of these projects, and the queue as a whole, in a non-discriminatory manner. DESC argues that granting the Pending Motion would violate the Commission's mandate because Solar Developer can point to no provision that would justify affording Solar Developer preferential treatment when compared against the rest of the queue. DESC notes that a decision in favor of Solar Developer, absent any reason for preferential treatment, may actually provide other customers in the queue—as well as those who previously withdrew—with legitimate discrimination claims, and would "put the entire queue in limbo and render the certainty meant to be provided by the milestone schedules meaningless." DESC's Response in Opposition to Motion to Maintain Status Quo at 8. In short, DESC alleges that in light of the consequences that would surely follow, granting the Pending Motion would be detrimental to the "public interest" contemplated by the Statute.

DESC supplied the Commission with guidance from the Federal Energy Regulatory Commission (the "FERC"), which cautioned that such extensions might present harm to later-queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated if the project is removed from the queue at a later date. *See, e.g.*, *Midcontinent*

Indep. Sys. Operator, Inc., 147 FERC ¶ 61,198 (2014) (advocating for the goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"). For these reasons, the FERC approved termination of interconnection agreements where the interconnection customer failed to make interconnection payments. *See Pacific Gas & Electric Co.*, 146 FERC ¶ 61,120 (2014); *Midwest Independent Transmission System Operator, Inc.*, 143 FERC ¶ 61,114 (2013).

DESC also alleges that a decision in favor of Solar Developer would establish firm precedent upon which other interconnection customers could file with the Commission and idle in the queue while the Commission wrestles with the issues presented therein. The Commission struggles to estimate what, if any, certainty would remain in the interconnection process if the milestone schedules in the IAs, a structure approved by this very Commission, could be modified unilaterally and indefinitely. Certainly, this would not only have the effect of increasing an electric utility's costs of managing its queue (costs that would likely be passed on to the ratepayers of South Carolina), but this would also inject additional uncertainty into the process of obtaining financing for renewable energy projects in South Carolina—a process vital to the growth of renewable energy projects in South Carolina.

We take this opportunity to remind the solar industry that the policies and procedures adopted by this Commission are designed to promote solar development and deployment by encouraging viable projects and discouraging speculative projects.

CONCLUSIONS OF FACT AND LAW

1. This Commission does not have the statutory authority to grant the injunctive relief requested by the Solar Developer in the Pending Motion.

2. Solar Developer's obligation to perform Milestones under the IAs is not affected by a challenge to provisions in the IAs upon which the Commission has not ruled—therefore, Solar Developer did not toll its obligations to make the First Milestone Payments simply by filing a Motion to Maintain Status Quo with the Commission.

3. The IAs and the South Carolina Standard require that the First Milestone Payments were due no later than 45 days from the date each Solar Developer executed the IAs.

4. Solar Developer did not submit the First Milestone Payments by the applicable deadlines without first securing relief from such obligations from the Commission—thus, the IAs terminated pursuant to their terms and the South Carolina Standard.

5. Allowing indefinite extensions upon the filing of a Motion to Maintain Status Quo has the potential to harm other interconnection customers in the queue because such a decision would create substantial uncertainty throughout the interconnection process.

In light of these conclusions, and having carefully considered the common issues raised in the Pending Motion, the Commission finds that it does not have the authority to grant the injunctive relief requested in the Pending Motion, and alternatively, that the Pending Motion fails to provide any appropriate basis upon which the Commission can provide the relief requested by Solar Developer.

Now, therefore, for the reasons set forth herein, the Pending Motion is denied.

IT IS HEREBY ORDERED:

BY ORDER OF THE COMMISSION:

_____
Comer H. Randall, Chairman

ATTEST:

_____
Justin T. Williams, Vice Chairman
(SEAL)